

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

IN RE: §
§
GORDON NELSON CORNELIUS, § CASE NO. 02-11034-RLJ-7
§
Debtor. §

MEMORANDUM OPINION AND ORDER

Before the court are two matters. First, on January 13, 2003, Kelly M. Crawford, acting in his capacity as the receiver ("Receiver") for C-Tech, L.L.P. and Robert Scholotterbeck, filed his motion seeking to dismiss the bankruptcy case of Gordon Nelson Cornelius for want of jurisdiction and for a bad faith filing. Second, as an alternative to dismissal, the Receiver filed his motion, as amended March 25, 2003, seeking relief from the stay to allow prosecution of claims brought by the Receiver against Mr. Cornelius in Civil Action No. 3-02-CV2457-B, *Kelly M. Crawford, as Receiver for C-Tech, L.L.P. and Robert Scholotterbeck v. Jeff A. Watson, Danny Wise, and Gordon "Nelson" Cornelius, Individually and d/b/a GNC*, pending before the United States District Court, Northern District of Texas, Dallas Division (the "Broker's Suit").

The Motion to Dismiss

The motion to dismiss is based on an order entered in Civil Action No. 3-01-CV2542-P, *Securities and Exchange Commission v. C-Tech L.L.P. and Robert Scholotterbeck* (the "SEC Action"). On December 3, 2001, the District Court entered its Order Appointing Receiver in the SEC Action (the "Receivership Order"). By such order, the District Court took exclusive jurisdiction and possession of all the assets of defendants C-Tech and Scholotterbeck and appointed Kelly Crawford as receiver for such assets. Paragraph I-4 of the order states as

follows:

All persons, including Defendants and their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with the, who receive actual notice of this Order by personal service or otherwise, are enjoined from in any way interfering with the operation of the Receivership or in any way disturbing the Receivership Assets and from filing or prosecuting any actions or proceedings which involve the Receiver or which affect the Receivership Assets, specifically including any proceeding initiated pursuant to the United States Bankruptcy Code, except with the prior permission of this Court. Any actions so authorized to determine disputes relating to Receivership Assets shall be filed in this Court.

A copy of the order was served on Nelson Cornelius on October 24, 2002. Cornelius filed bankruptcy under Chapter 7 of the Bankruptcy Code on December 11, 2002.

By his motion to dismiss, the Receiver contends that the Receivership Order enjoins Cornelius from filing bankruptcy without obtaining leave from the District Court, and that Cornelius's bankruptcy filing is in direct conflict with the Receivership Order. The Receiver argues that Cornelius's assets, to the extent they were fraudulently obtained from investors, are not assets of the bankruptcy estate and are to be held by him as receiver in constructive trust for the benefit of the defrauded victims. The Receiver further contends that Cornelius's filing was made in bad faith and that the case should be dismissed for want of jurisdiction or, alternatively, as a bad faith filing.

In response, Cornelius argues that the Receivership Order is not applicable to him because he was not a party to the action giving rise to the order. He also contends that due process concerns prevent application of the order, both because he is not a party to the action and because he was not served with the order until several months after entry of the order. Finally, Cornelius contends that, assuming the order is applicable to him, the order is, to that extent, improper.

The court strictly construes the terms of the order, recognizing that the order was drafted, presumably by Crawford, and approved without notice to or joinder of Cornelius. In reviewing paragraph I-4, it specifically provides that all persons are enjoined from (1) interfering with the operation of the Receivership; (2) disturbing the Receivership Assets; or (3) prosecuting any “actions or proceedings which involve the Receiver or which affect the receivership assets, specifically including any *proceeding* initiated pursuant to the United States Bankruptcy Code, except with prior permission of this Court.” The court fails to see how this provision is triggered by a mere filing of a bankruptcy *case*. *Proceeding* and *case* are not synonymous or interchangeable terms. A petition under the Bankruptcy Code commences a bankruptcy case. 11 U.S.C. §§ 301, 302, 303, and 304. The distinction is best explained as follows:

The Title 11 U.S.C. case is not the same character of action as the civil action which is a case under the Federal Rules of Civil Procedure. In the Title 11 case, an adversary proceeding commenced by a complaint under Part VII of the Bankruptcy Rules is the same as a civil action under Federal Rules of Civil Procedure. *See* Rule 7003. All disputes in controversy within a Title 11 case and all other matters which require judicial determination by the Bankruptcy Court and all matters requiring administrative action during the pendency of the Title 11 case, are properly referred to as “proceedings” within the Title 11 case. Thus, the term has a broader reference than encompassing just litigated matters. A single proceeding, whether administrative or judicial in nature, is a part within the whole, i.e., within the Title 11 case.

...

Thus, under the Code, the term “proceeding” means all litigations and all controversies determined by the court and all procedures of administration affecting the property of the estate, the debtor or parties in interest while the case is under the jurisdiction of the court.

WILLIAM L. NORTON, BANKRUPTCY CODE AND RULES, xi (West Group 2003).

The Receiver has not been joined or named as an affected party in any *proceeding* initiated by Cornelius in his bankruptcy case.

Even if the order were found to apply to Cornelius, Cornelius's filing cannot be deemed a bad faith filing. Cornelius, as he asserted, is not a party to the SEC Action and thus had no opportunity to participate in the case prior to issuance of the Receivership Order. His decision to file, despite the language of the Receivership Order, was legally defensible.

The Motion for Relief

The Receiver requests that the stay be modified to allow the Receiver to go forward with its action against Cornelius in the Broker's Suit. The Receiver contends that relief should be granted because Cornelius's bankruptcy filing was made in bad faith. The court has above addressed the Receiver's argument that the bankruptcy filing was made in bad faith based on it arguably violating the Receivership Order. The Receiver raises additional grounds under the stay motion, however. The Receiver contends the bankruptcy filing is improper because (1) it was done to thwart the Receiver's recovery of funds held by Cornelius; (2) the main purpose of the filing was to avoid the claims of the Receiver, which claims sound in fraud and constitute the bulk of Cornelius's debt; (3) Cornelius has the capacity to satisfy the claims against him; and (4) Cornelius sold securities without possessing a license to do so; that the securities sold by Cornelius were not registered; Cornelius misrepresented the nature of the securities; and Cornelius may still be attempting to market unregistered securities.

The Receiver next contends that modifying the stay and allowing the Receiver to go forward with the Broker's Suit promotes judicial economy. In support of this position, the Receiver argues that there exists a need to liquidate the Receiver's claim, which such claim is based on securities fraud and is best decided by the District Court. The Receiver is concerned that the other defendants in the Broker's Suit will be encouraged to file bankruptcy, resulting in

the Receiver potentially having to conduct separate trials in various bankruptcy courts across the state when the issues could be decided in one trial before the District Court.

The third argument made by the Receiver in support of granting relief is based on the Receiver's contention that the automatic stay does not apply to the Broker's Suit, which the Receiver contends involves only non-bankruptcy estate assets. In this regard, the Receiver contends that Cornelius is in possession of approximately \$83,700, which constitutes commissions received on improper sales of securities and that such proceeds are subject of a constructive trust and, therefore, do not constitute property of the bankruptcy estate.

Finally, the Receiver contends that the Receiver's action in the Broker's Suit is exempt from the automatic stay as the Broker's Suit involves principally the Receiver's enforcement of police and regulatory powers, as opposed to the seeking of a monetary or pecuniary recovery.

The stay motion will be denied. First, the Receiver offered no evidence in support of his arguments. There is, therefore, no evidence to support the Receiver's contentions concerning Cornelius's motives in filing bankruptcy. Plus, even if true, this court is not convinced that such motives justify a finding of bad faith. The court has reviewed the file, specifically the Schedules and Statement of Financial Affairs. The scheduled liabilities do not indicate that the Receiver's claim constitutes the bulk of Cornelius's debt. Cornelius lists total debts of \$145,101.17, consisting of unsecured non-priority claims of \$102,134.81, unsecured priority claims of \$17,254.36, and secured claims of \$25,712. Of this amount, the Receiver's claim is listed in the amount of \$82,327.45. Cornelius lists twenty unsecured creditors, several of which include claims held by credit card companies. In addition, Cornelius reflects a priority claim held by the IRS in the amount of \$17,254.36. In short, Cornelius's Schedules reflect a situation that is

typical of consumer debtors filing with this court.

The Receiver's contention that judicial economy is served by granting relief assumes that litigation is necessary to liquidate the Receiver's claim. Cornelius's response states he has "no intention of objecting to [the] claim." While the Chapter 7 Trustee will have an opportunity to object to the claim, there is nothing to date that indicates the Trustee will be lodging an objection to the claim.

As for the argument that the stay does not apply because any ill-gotten proceeds held by Cornelius are subject of a constructive trust, the court would reiterate that no evidence was submitted by the Receiver in support of this position. The Schedules do not reflect that Cornelius was holding any funds of any consequence at the time he filed the bankruptcy. The Schedules reflect cash on hand of \$152, as well as five accounts maintained with either credit unions or banks. The aggregate total deposits in these five accounts is \$682. No contention is made that Cornelius has misrepresented his assets in his Schedules.

The final argument made by the Receiver concerns the nature of the Broker's Suit and the Receiver's contention that such suit is in furtherance of the government's police or regulatory powers. In this regard, the motion makes nothing more than mere conclusory statements. A copy of the complaint initiating the Broker's Suit is attached to the motion for relief from stay filed by the Receiver. In reviewing the complaint, the court notes that the only relief requested against Cornelius under the prayer is recovery of a judgment of \$89,327.97. In addition, in the body of the complaint a request is made for an accounting and an order of disgorgement of all commissions, fees, or profits received from C-Tech. There has been no evidence to indicate that Cornelius is presently holding any such commissions, fees, or profits that would be subject of an

order of disgorgement. As for an accounting, the court notes that traditional bankruptcy procedures allows the Receiver to obtain an accounting of any commissions, fees, and profits received from C-Tech. At present, there appears to be no purpose served by granting relief.

Order

Upon the foregoing, the court denies both the motion to dismiss and the motion for relief. The motion for relief is denied without prejudice to reurging.

DATED: JUN 18 2003



ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE

The Clerk shall provide copies to:

Attorney for Debtor: Charles Dick Harris, P.O. Box 3835, Abilene, TX 79604;

Attorney for Kelly M. Crawford: Stephen J. Womack, 5956 Sherry Ln., Suite 1400, Dallas, TX 75225; and

Chapter 7 Trustee: Harvey Leon Morton, Law Office of Harvey L. Morton, P.O. Box 10305, 1604 Ave. M, Lubbock, TX 79408.